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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884.

No. 1186.

THE CHICAGO AND NORTHWESTERN RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

EMANUEL H. CRANE.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF IOWA.

FILED OCTOBER 31, 1884.

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1 Pleas in the circuit court of the United States for the southern district of Iowa, central division, at a term thereof begun and holden in the United States court-house, at the city of Des Moines, in said district, on the second Tuesday of May, it being the thirteenth day of May, in the year of our Lord one thousand eight hundred and eighty-four.

Present: Hon. David J. Brewer, circuit judge; Hon. J. M. Love, Hon. O. P. Shiras, judges.

Attest: E. R. MASON, *Clerk.*

2 Be it remembered that on the 16th day of October, A. D. 1883, a transcript from the circuit court of Iowa, in and for Polk county, in the case of Emanuel H. Crane *vs.* The Chicago and Northwestern Railway Company *et al.*, was filed in the clerk's office of the circuit of the United States for the southern district of Iowa, central division, which said transcript of record is in the words and figures following, to wit:

3 *Petition.*

In the Circuit Court of the State of Iowa, in and for Polk county, Iowa. May Term, 1883.

EMANUEL H. CRANE, Pl'ff,

vs.

THE CHICAGO AND NORTHWESTERN RAILWAY COMPANY & THE DES MOINES & MINNEAPOLIS R. R. COMPANY, Def'ts.

The plaintiff, a resident, voter, tax payer, and property holder of Polk City, in Madison township, Polk county, Iowa, for himself and other resident voters, tax payers, and property holders of Polk City & Madison township, in Polk county, Iowa, too numerous to be made parties hereto, for causes of action states:

That the defendant, The Chicago and Northwestern Railway
4 Company, is a corporation organized and existing under the laws of the State of Illinois, and doing business and operating a railroad within the State of Iowa.

That prior to the month of August, 1877, the defendant, The Des Moines & Minneapolis R. R. Company, was a corporation organized and existing under the laws of Iowa by the name and style of the Des Moines & Minnesota R. R. Company; that on or about Aug., 1877, the said Des Moines & Minnesota R. R. Company changed its name to the Des Moines & Minneapolis R. R. Company; that the Des Moines & Minnesota R. R. Co. and the Des Moines & Minneapolis R. R. Co. were, in fact, one and the same company.

That the object of said corporation, as defined by its articles of incorporation, was to construct and operate a line of railroad
5 from the city of Des Moines, in Polk county, Iowa, to the State line in the direction of Minnesota.

That at and prior to the month of August, 1870, the said Des Moines & Minnesota R. R. Co. had surveyed and located its line of

road from the city of Des Moines, in Polk county, Iowa, through said county, *via* Polk City, in Madison township, in said county, and was then proceeding to construct the same.

That the said Des Moines and Minnesota R. R. Co. took all the necessary legal steps to have a special tax of three per cent. on the assessed valuation of the taxable property in Madison township, Polk county, Iowa, voted to aid in the construction of its said railroad from the city of Des Moines, in Polk county, *via* Polk City, in said county, to Ames, in Story county, Iowa, said tax not to be due and
6 payable until said railroad should be built and operated from the city of Des Moines *via* Polk City through Polk county.

That on the 5th day of October, 1870, a special tax of three per cent. on the taxable property in Madison township, under the then assessment of said property, was voted to said company to aid in its construction of said railroad, upon the condition that it be constructed and operated from the city of Des Moines, in Polk county, Iowa, *via* Polk City, to Ames, in Story county, Iowa; that the said company did construct said railroad from the city of Des Moines, through Polk county, *via* Polk City, to Ames, in Story county, and operated the same, making Polk City a station on its main and continuous line between said points, and having complied with
7 the condition upon which said three per cent. tax was voted the same was levied, collected, and paid over to the said company, amounting to the sum of about seventeen thousand dollars.

That on the 8th day of July, A. D. 1874, Polk county, Iowa, through its board of supervisors, and in due and legal manner, all the necessary proceeding legal steps having been taken and complied with to authorize said act, did convey by good and sufficient deed to said railroad company all the swamp lands of Polk county, amounting to about fifteen thousand acres, and of great value, upon the express condition that said railroad be constructed and operated from the city of Des Moines through Polk county *via* Polk City.
8 That said company accepted said grant, and became the owners and possessors of the said swamp lands.

That many citizens of Polk City and of Madison township, in Polk county, Iowa, subscribed stock to said company, and paid the same upon the conditions that the said railroad should be constructed through Polk City, making Polk City a station on its main and continuous [line] from Des Moines to Ames, in Story county, Iowa.

That said railroad was constructed from the city of Des Moines, in Polk county, Iowa, *via* Polk City, to Ames, in Story county, Iowa, and was operated on said original line through Polk City, in accordance with the terms and conditions upon which said taxes were voted, levied, collected, and paid to said company, and by
9 it accepted, and said swamp lands conveyed, and subscriptions paid to said company and accepted, for a number of years and until about — day of ——, 1880.

That Polk City was the largest and most important station on said railroad between Des Moines and Ames, and said railroad was

of great benefit to the town of Polk City while its main and continuous line between said points was operated through it.

That on or about the — day of ——, 1879, the defendant, the Chicago and Northwestern Railway Company, leased said line of railroad and came in possession of all the franchises and privileges of said company.

That the defendant has, since it obtained control of said
10 railroad and became possessed of its franchises, privileges, and property, changed the line and location of said railroad, and has built, and is now operating, its main line of road about two miles east of Polk City, to the great damage of plaintiff and other property owners in and about Polk City.

That the defendant is now, and for some time has been, operating the railroad on an entirely different line than that upon which it was originally constructed, and for which the aforesaid taxes and subscriptions were paid and swamp lands conveyed.

That the defendant neglects and refuses to operate said railroad upon the line originally constructed, though often requested so to do, but continued to operate the main line of said railroad,
11 leaving Polk City about two miles to the west of it, in gross violation of the terms and conditions upon which said taxes were voted, collected, and paid, swamp lands conveyed, and subscriptions paid.

Plaintiff states that he owns property in Polk City, Iowa, and in Madison township, Polk county, Iowa, which has greatly depreciated in value by reason of the change made in the main line of said railroad.

That with him many other citizens and property owners in and about Polk City, whom he represents in this cause, have suffered great damage in the depreciation of property in and about Polk City, caused by the change of said main line of railroad, and great
12 inconvenience and damage by reason of not having a good and handy market for the products of their land, and by reason of the delay of mails, irregularity of trains, and lack of sufficient cars to carry freight, caused by Polk City not being on the main line of said railroad.

Wherefore plaintiff demands that defendants be required to reconstruct and operate the main line of said railroad upon the line originally constructed, running from the city of Des Moines, in Polk county, Iowa, north, *via* Polk City, to Ames, in Story county, Iowa, making Polk City a station on the said main and continuous line of railroad from the city of Des Moines, Iowa, to Ames, Iowa, and that same be constructed and operated in full compliance with the
13 terms and conditions upon which the taxes were voted and paid, swamp lands conveyed, and subscriptions paid as aforesaid, and prays a peremptory writ of mandamus, commanding the said defendant to forthwith comply with the above demands, and for such other remedy and relief as may be lawful and proper in the premises.

BARCROFT, BOWEN & SICKMON AND
CALLENDER & SMITH,
Attorneys for Pl'ff.

STATE OF IOWA, *County of Polk:*

I, Emanuel H. Crane, being first duly sworn, depose and say: That I am the plaintiff in the above-entitled cause; that I have heard the foregoing petition read and know the contents
14 thereof, and that the statements and allegations therein contained are true, as I verily believe.

EMANUEL H. CRANE.

Subscribed in my presence and sworn to before me, by the said Emanuel H. Crane, this 26th day of April, A. D. 1883.

ERASTUS W. SMITH,
Notary Public in and for Polk Co., Iowa,

(Endorsed:) Circuit court. Law. 5827. Mandamus. Emanuel H. Crane *vs.* The Chicago & Northwestern Railway Co. & Des Moines & Minneapolis R. R. Co. Petition. Copy fee $3.00. Filed Apr. 26th, 1883. P. D. Ankeny, cl'k. $1.50 paid by Barcroft, Bowen & Sickmon and Callender & Smith, att'ys for pl'ffs.

15 *Original Notice.*

STATE OF IOWA, } ss:
Polk County, }

In the Circuit Court for Polk County, Iowa. At May Term, A. D. 1883.

EMANUEL H. CRANE, Pl'ff,
vs.
THE CHICAGO AND NORTHWESTERN RAILWAY COMPANY.

The Chicago and Northwestern Railway Company, defendant:

You are hereby notified that on or before the 26th day of April, 1883, a petition will be filed by said plaintiff, Emanuel H. Crane, for himself and others, in the office of the clerk of the circuit court of said Polk county, Iowa, claiming of you that you be required to recon-
16 struct and operate that part of railroad now operated by you running from Des Moines, in Polk county, Iowa, in a northwesterly direction, so as to run and operate the said railroad as the main and continuous line through Polk City, in Polk county, Iowa, and praying a peremptory writ of mandamus, commanding you forthwith to reconstruct and operate said line of railroad through Polk City, in Polk county, Iowa, in full compliance with the terms and conditions upon which taxes were voted and paid, swamp land granted to and other subsidies given your lessor or the company constructing the original line of railroad, and for other and further relief, all of which will more fully appear in the petition to be filed as aforesaid, which see for particulars and further demands.

17 And that unless you appear thereto and defend before noon of the second day of the next term of the said court, commencing at Des Moines the 7th day of May, 1883, default will be entered against you, and judgment rendered thereon.

Dated this 25th day of April, A. D. 1883.

BARCROFT, BOWEN & SICKMON AND
CALLENDER & SMITH,
Attorneys for Plaintiff.

(Endorsed:) 307. Original notice. Emanuel H. Crane *vs.* The Chicago and Northwestern railway. The within notice came into my hands on the 26 day of Apr., 1883, and on the same day I served
18 the same on the within-named defendant, The Chicago and Northwestern Railway Company by offering to read the within notice to Chamberlain, gen. agent of said company, which he waived, and delivering to him a true copy thereof. All done within Polk county. Mileage, .90. A. D. Littleton, sheriff of Polk Co., Ia. L. A. Shaw, dep. Filed Apr. 30th, 1883. P. D. Ankeny, clerk.

19 In the Circuit Court of the State of Iowa, in and for Polk County, Iowa. May Term, 1883.

EMANUEL H. CRANE

vs.

THE CHICAGO & NORTHWESTERN RAILWAY COMPANY and THE DES MOINES & MINNEAPOLIS RAILROAD COMPANY.

Now come the defendants and demur to the petition in this case, and assign the following grounds:

First. The petition does not state facts sufficient to entitle the plaintiff to the relief demanded in this, to wit:

It is not shown in said petition that the plaintiff was either a resident voter, tax payer, or property holder of Polk City, in Madison township, at the time any matters stated in said
20 petition transpired or took place, but only that the plaintiff is now at the time of filing this petition a resident tax payer, voter, and property holder of Polk city, which is not sufficient to entitle the plaintiff to any relief whatever.

2. That there is a defect of parties plaintiff in this case in this, to wit:

The petition in this case shows on its face that it is a proceeding to inforce a contract between the county of Polk, in the State of Iowa, a municipal corporation, and the defendant, and also a proceeding to compel the performance of a contract between Madison township, in Polk county, and the defendants, and neither Polk county, as a municipal corporation, nor the officers of Madison township are made parties plaintiff.

21 3rd. No action of mandamus will lie to compel the performance of the contract set out in plaintiff's petition.

W. S. CLARK & N. M. HUBBARD,
Att'ys for Def't.

22 *Answer of Defendants.*

In the Circuit Court of the State of Iowa, in and for Polk County. May Term, 1883.

EMANUEL H. CRANE

vs.

THE CHICAGO & NORTHWESTERN RAILWAY CO. and THE DES MOINES & MINNEAPOLIS RAILWAY COMPANY.

For answer to petition of plaintiff defendants say:

1st. They admit their corporate capacity as alleged by the plain-

tiff, and also that the Des Moines & Minneapolis Railway Co. and the Des Moines & Minnesota Railway Co. are one and the same.

2nd. The defendants admit the survey, location, and construction of the railroad from Des Moines *via* Polk City to Ames, as alleged.

3rd. They admit that the Des Moines & Minnesota Rail-
23 road Co. took the necessary legal steps to have a special tax of three per cent. assessed, voted, and collected for the benefit of the construction of said road.

Whether the amount of said tax so assessed was in the sum of about $17,000, defendants have no knowledge nor information sufficient to form a belief.

4th. Defendants admit that the county of Polk voted to the Des Moines & Minnesota Railroad Co. all the swamp lands of said county, but whether they amounted to fifteen thousand acres, as alleged by plaintiff, these defendants have no knowledge or information sufficient to form a belief.

5th. Whether the citizens of Polk City subscribed or paid any money to aid in the construction of said railroad, these
24 defendants have no knowledge or information sufficient to form a belief.

6th. These defendants admit that said railway was operated through Polk City until about the 1st day of October, 1880, but deny that Polk City was the largest or most important station on said railroad between Des Moines and Ames, and *denies* that said railroad was of great or any considerable benefit to said Polk City while the same was operated through said town, for the reasons stated hereinafter in this answer.

7th. Defendants admit that the Chicago and Northwestern Railway Company leased said line of railroad, and came into possession of all the franchises and privileges of said Des Moines & Minneapolis Railroad Co. during the year 1879, as alleged, and admits
25 that defendant, C. & N. W. R'y Co., changed the line and location of said railroad, and has built and is now operating its main line of road about two miles east of Polk City, but *denies* that it is so operated to the great or any damage of the plaintiff or other property owners in and about Polk City.

Defendants deny all il-egality, and all and any wrong to plaintiff, or other tax payers and citizens of Polk City or Polk Co., by reason of the change of said line of road.

Whether the plaintiff is the owner of any property in Polk City or in Madison township, these defendants have no knowledge or information sufficient to form a belief; and defendants deny that if plaintiffs own any property in Polk City, the same has been depreciated in value by reason of any change made in said line of railroad, and deny that any resident tax payer or property holder
26 of Polk City has suffered any damage whatever by reason of such change; deny that the plaintiff and all other citizens have not a good and convenient market for their products, or that there has been any delay of mails, or irregularity of trains, or lack of sufficient cars to carry freight, caused by Polk City not being on the main line of said railroad or otherwise.

II.

And for further and other answer to the plaintiff's petition, defendants say that the plaintiff ought not to have or maintain his said suit in this behalf, because the defendants say that it appears upon the face of the plaintiff's petition only that he was a resident, voter, tax payer, and property holder at the time of the commencement of this suit, but it is nowhere alleged in said petition that he was such resident, tax payer, or property owner of Polk City when the line of railroad was located or constructed through said Polk City, or when the said tax in aid thereof was voted by Madi-
27 son township, or when the same was expended, or at any time when the several matters set forth in the plaintiff's petition occurred and transpired.

2. And for further answer and defense defendants say that the plaintiff ought not to further have or maintain his suit in this behalf, because they say that neither the action of mandamus nor any other action will lie in behalf of the said plaintiff for the violation of the contracts set out in the plaintiff's petition, the only proper parties to such a suit, if any may be maintained, being the officers of the *quasi* corporation of Madison township, or the municipal corporation of the county of Polk, in the State of Iowa.

3. And for further answer and defense to plaintiff's petition defendants say: About the year 1879 the Chicago and North-
28 western Railway Co. leased the Des Moines & Minneapolis railroad, then constructed and in operation from the city of Des Moines *via* Polk City to Ames, and thence north to Story City, in Story county, a distance of about (58) fifty-eight miles, and during the said year the Chicago and Northwestern Railway Co. became the owners of all the stock, franchises, and privileges of the Des Moines & Minneapolis Railroad Co., and has ever since and now owns, holds, and controls the same, and operates said railway as a part of the system of the Chicago & Northwestern Railway Co.

At the time of the construction of said railway and the acquisition of the same by the Chicago & Northwestern Railway Co. said railroad between Des Moines and Story City was a narrow-gauge road, and during the years 1880 and 1881 the defendant, the Chicago
29 and Northwestern Railway Co., changed the gauge to a standard gauge, relaid the same with new steel — and ties, making the same a first-class road.

The narrow-gauge road was not a first-class road in any respect, very little grading having been done, and running mainly over the top of the ground, with the surface nearly in its natural and native condition, there being very few cuts and very few fills, and the road, as a whole, as it then existed, was of very little benefit to any towns along it or to the company which owned it, and the road was wholly unable to earn operating expenses and a reasonable interest upon its cost.

The Chicago & Northwestern Railway Co. extended the line from Story City to Jewell Junction, and thence north through
30 Webster City, Eagle Grove, Algona, and to the State line

north at Elmore, where the same connects with a through line, now controlled and operated by the Chicago & Northwestern Railway Co., known as the Chicago, Minneapolis, St. Paul & Omaha railroad, thus making a through and continuous line, and very direct from the city of Des Moines to the cities of Minneapolis and St. Paul. The said road is built and constructed as a first-class road, with steel rails and easy gradients, and is capable of and is doing a large amount of through business and traffic.

These defendants say that, with a view to making such a first-class road, it becomes absolutely essential and necessary to
31 change the line so the same should run about two miles or two miles and a half east of Polk City, in order to avoid a very heavy grade of about 85 feet to the mile for three miles, going down into Polk City, and about the same distance and grade going out of it.

The grade is not only very heavy, but the curves necessarily very great, and an engine capable of hauling 25 to 30 cars on the present line as constructed east of Polk City could only haul, at most, only ten to twelve cars over the line *via* Polk City.

In view of this condition of affairs and the impracticability of operating the road through Polk City, the Chicago & Northwestern Railway Co., in the summer of 1880, made overtures to the people of Polk City to change the line to its present location.

32 After many conferences and public meetings in the town of Polk City, the citizens of said town agreed with the Chicago & Northwestern Railway Co. that if said company would build a broad-gauge road from a point about two miles northeast of Polk City into the town, and change the location of their depot to a point more convenient for the citizens of Polk City to do business, both as to passengers and freight; to run two passenger trains from the main line to Polk City on their way from Des Moines to Ames, two mixed passenger and freight trains each day; move all freight promptly, with no greater charge for freight or passengers than if Polk City were on the main line; would also build and maintain good and sufficient stock yards in the vicinity of the depot in Polk City,
33 to accommodate all shippers, &c.; would transport free all the material from Chicago, or any other point west of that place, to build a bridge over the Des Moines river; would pay the sum of one thousand dollars in money towards the building of said bridge, besides such transportation; and if the company would further perform, all and singular, the stipulations and agreements set out in a certain contract made between the citizens and tax payers of Polk City and Polk county and the Chicago and Northwestern Railway Co., dated on the 2nd day of September, 1880, as shown by a copy of said contract hereto annexed and made a part of this answer, then and in that case it should be lawful and proper for the defendants to change such line of railway and take up the narrow
34 gauge running into Polk City.

Said contract was made and signed by thirty-five of the principal tax payers and residents and business men of Polk City and Madison township, as appears by the said copy annexed.

In pursuance of the said contract the main line of the defendants' road was changed, as alleged in plaintiff's petition, at an expense to defendant of $15,000.00, and as herein admitted, and the narrow-gauge track, from a point about three miles south of Polk City to a point about two miles northeast thereof, was then and there, during the year 1881, taken up and a broad gauge built into said Polk City as provided by said agreement, and from that time hitherto and now the defendant, The Chicago and Northwestern rail-
35 way, has operated a broad-gauge road into said Polk City, in all respects in accordance with the contract herein referred to.

And these defendants aver that said contract was made publicly and the said plaintiff, Emanuel H. Crane, and all other citizens of Polk City and Madison township and the county of Polk, in the State of Iowa, were each and all well acquainted and had knowledge of the said contract and all that has been done thereunder, and acquiesced and consented thereto and therein.

And defendants aver that the citizens of Polk City, and of Madison township and Polk county, acquiesced and made no objections to the taking up of said narrow-gauge track and the lying down of the broad gauge, and the building of the new depot and stock yards.

36 And these defendants further say that by reason of the said contract, and in compliance with the conditions of the same by the Chicago & Northwestern Railway Co., the citizens, voters, and tax payers of Madison township, and Polk City and Polk county, have been greatly benefited, and the town of Polk City placed upon a through line of railway much more advantageous to them in all business respects than the narrow-gauge railway as built and located through their town.

The defendants further states that the Chicago & Northwestern Railway Co. has become and is the sole owner of the stock and road, and franchises of the Des Moines and Min-eapolis Railroad Company, and that the latter-named company has no longer any interest
37 therein, and has no interest in the subject of litigation mentioned in the plaintiff's petition; that in case any relief can or may be granted to the plaintiff or any other person, the Chicago & Northwestern Railway Co. will be solely liable to perform and execute any and all orders of the court in respect thereto, and that said Chicago & Northwestern Railway Co. is entirely solvent and able to respond to any judgment or decree which may be rendered in behalf of the plaintiff in this suit.

Wherefore defendants say that the plaintiff, the town of Polk City and Madison township, and the county of Polk, are each and all forever estopped by reason of the matters hereinbefore stated to claim or demand the relief prayed by the plaintiff or any
38 relief whatever by reason of the change of the line of railways hereinbefore set forth.

Wherefore defendants pray judgment.

W. S. CLARK AND N. M. HUBBARD,
Att'ys for Def'ts.

We, the undersigned, citizens and tax payers of Polk City, Polk county, Iowa, hereby agree with the Des Moines and Minneapolis Railroad Company and the Chicago and Northwestern Railroad Company that in lieu of the narrow-gauge road heretofore operated from Des Moines by way of Polk City to the north line of Polk county we will accept of a broad-gauge line of railroad, to be built and operated from a point about two miles northeast of Polk
39 City to a point within one hundred feet of Eggleston's mills, in the town of Polk City.

The said Des Moines and Minneapolis and the Chicago and Northwestern Railroad Companies to build and operate the said broad or standard gauge road to the said point above mentioned as soon as the right of way can be secured, and to move the depot from the point where it now stands to the terminus of the said standard-gauge road near Eggleston's mills, or to build a new one at that point, as they may elect.

The said Des Moines and Minneapolis Railroad Company and the Chicago and Northwestern Railroad Co. agree to build the said standard-gauge road and depot and operate and maintain the same at their own expense, and to run at least one mail and passenger train each way daily thereon, and one freight train each way daily, which
40 shall carry passengers, Sundays excepted, and also to move all freight promptly to and from said town of Polk City, and passenger and freight rates shall not be computed at a greater rate than by the distance by the narrow-gauge road line to Ames and Des Moines.

The said Chicago and Northwestern Railroad Company further agree, at their own expense, to build and maintain good and sufficient stock yards in the vicinity of the depot at Polk City to accommodate all shippers to and from said point in shipping to or from Chicago or any other point on their line of railway or elsewhere.

And the said Chicago and Northwestern railway further agree, whenever it shall be determined to erect a wagon-road bridge across the Des Moines river near Polk City, to haul all the material from
41 Chicago or any other point west of that place on the line of their railway, necessary for the erection of said bridge to Polk City.

And the said Chicago & Northwestern Railroad Company further agrees to give the sum of one thousand dollars in money, in addition to the transportation of materials, in aid of the erection of said bridge.

It is also further expressly understood and agreed, as one of the conditions of this agreement in behalf of the citizens and tax payers of Polk City, that the said Chicago and Northwestern Railroad Co. will operate said line of road to the point above mentioned, in Polk City, in good faith, so as to give the people of Polk City first-class advantages for the transportation of freight and passengers.

42 It is further provided that the provisions of this contract respecting the relocation of the depot by the Chicago and Northwestern R. R. Co. shall be complied with within sixty days from Sept. 1st, 1880.

It is further expressly agreed and understood and made an express condition, upon which this entire agreement is based, that if the Chicago & Northwestern Railroad Company, its lessees, grantees, or assigns, or the Des Moines & Minneapolis Railroad Company, its grantees, lessees, or assigns, shall fail to comply with this contract in any respect, both in its letter and spirit, or shall in any manner discriminate against Polk City or its citizens or shippers to or from that point, either with respect to passengers or freight traffic, then, or in either of such events, this contract shall, at the option of said citizens of Polk City and vicinity, who sign this agree-
42½ ment, or any five of them, become null and void, and all right of action or rights of action that now exist in favor of the citizens and residents of Polk City and vicinity, or any one of them, shall revive and exist in favor of the said citizens or citizen with the same force and effect as if this contract had not been executed, anything in this contract to the contrary notwithstanding.

It is further agreed that the said Chicago & Northwestern R. R. Co. shall pay the sum of two hundred dollars as attorney's fees to Harris Eggleston, for the citizens of Polk City, and shall further day the cost of the pending suit.

Dated at Polk City, this 2d day of September, A. D. 1880.

N. R. Kuntz.	O. H. Rogers.
H. Eggleston.	A. T. Street.
S. S. Robinson.	A. Vandarie.
T. L. Dyer.	J. M. Eskingen.
M. H. Pierce.	R. A. H. Makershed.
C. L. Warden.	S. H. Houser.
James Wilson.	C. J. Clark.
Thos. Rensall.	John Channon.
Dan'l Mauch.	R. H. Simmes.
H. C. Pennell.	C. M. Burt.
R. B. Armstrong.	J. M. Householder.
Geo. W. Miles.	S. C. Beals.
43 J. B. Hillison.	Jacob May.
J. Simmons.	B. F. Allen.
R. W. Stubbs.	J. J. Steadman.
Jackson Terrell.	J. H. Grigsby.
H. R. Nussbaum.	D. F. Leicht.
A. Snyder.	

The Des Moines and Minneapolis Railroad Company and the Chicago and Northwestern Railway Company have caused these presents to be signed by their presidents and their seals to be affixed the day and year first above written.

CHICAGO AND NORTHWESTERN
RAILWAY COMPANY,
By ALBERT KEEP, *President.*
DES MOINES AND MINNEAPOLIS
RAILROAD COMPANY,
By MARRION HUGHIT, *President.*

44 (Endorsed:) The Polk Co. circuit court. Emanuel H.

Crane *vs.* C. & N. W. R'y and D. M. & M. R. R. Co. Answer. W. S. Clark & N. M. Hubbard, att'ys for def't-. Filed June 8th, 1883. P. D. Ankeny, cl'k, by L. A. Wilkinson, dep.

45 *Petition for Removal to the Circuit Court of the United States, Southern District of Iowa, Central Division.*

In the Circuit Court of Polk County, Iowa.

EMANUEL H. CRANE

vs.

THE CHICAGO & NORTHWESTERN RAILWAY CO. and THE DES MOINES AND MINNEAPOLIS RAILWAY CO.

To said Polk county circuit court:

Your petitioner, The Chicago & Northwestern Railway Company, respectfully shows to this honorable court that the matter and amount in dispute in the above-entitled suit exceeds, exclusive of costs, the sum or value of five hundred dollars.

That your petitioner was at and before the time this suit was commenced, and at all times since has been, and still is, a corpo-
46 ration duly organized and existing under and by virtue of the laws of the State of Illinois, and a citizen of said State, with its principal place of business in said State of Illinois; and that your petitioner has never been organized under the laws of Iowa, and never was, and is not now, a citizen of the State of Iowa.

That your petitioner's co-defendant, The Des Moines & Minneapolis Railway Co., is merely a nominal party in this suit, for the reason that your petitioner is the owner of all the stock and franchises of the Des Moines & Minneapolis Railway Company, and is the lessee of said railway in perpetuity, charged with the duty of operating said railway, and subject to the payment of all claims or demands of every nature and kind made against said Des Moines & Minneapolis Railway Co., and your petitioner will be solely liable to obey any order made in this cause, and to perform any
47 judgment rendered; that the controversy in this case is wholly between the plaintiff and the defendant, The Chicago & Northwestern Railway Co., who are citizens of different States, and which controversy can be fully determined as between them without the presence of the Des Moines & Minneapolis Railway Co.; that your petitioner is the only defendant actually interested in such controversy; that the plaintiff, Emanuel H. Crane, was at and before the time of bringing this suit, and at all times since has been, and still is, a citizen of the State of Iowa and a resident thereof.

And your petitioner offers herewith a bond with good and sufficient surety for his entering in said circuit court of the United States on the first day of its next session a copy of the record in this
48 suit, and for paying all costs that may be awarded by said circuit court of the United States, if said court shall hold that this suit was wrongfully or improperly removed thereto.

And your petitioner prays this honorable court to proceed no further herein, except to make the order of removal required by law,

and to accept the said surety and bond, and to cause the record herein to be removed into said circuit court of the United States in and for the southern district of Iowa, central division.

And petitioner will ever pray.

W. S. CLARK & N. M. HUBBARD,
Att'ys for Petitioner.

STATE OF IOWA, }
Linn County, } *ss:*

49 I, N. M. Hubbard, being duly sworn, on oath say: That I am one of the attorneys for the Chicago & Northwestern Railway Company, that petitioner above named; that I have read the foregoing petition and know the contents thereof, and that the statements and allegations therein contained are true, and that I have equal knowledge of the facts stated with any general offer of said company.

N. M. HUBBARD.

Subscribed by the said N. M. Hubbard in my presence, and by him sworn to before me, this 24th day of May, 1883.

CHAS. P. DAWLEY,
Notary Public in and for said County and State.

50 (Endorsed:) Polk county circuit court. Emanuel H. Crane *vs.* C. & N.W. R'y Co. and D. M. & M. R'y Co. Petition to remove to U. S. court. Filed June 8th, 1883. P. D. Ankeny, clerk, by L. A. Wilkinson,, dep.

Bond.

Know all men by these presents, that the Chicago & Northwestern Railway Co., as principal, and J. J. Smart, as surety, are held and firmly bound unto Emanuel H. Crane in the penal sum of two hundred and fifty dollars; for the payment whereof, well and truly to be made unto the said Emanuel H. Crane, his heirs, representatives, and assigns, we bind ourselves, our heirs, representatives, and assigns, jointly and severally, firmly by these presents.

Yet upon these conditions:

51 The said Chicago and Northwestern Railway Company having petitioned the circuit court of Polk county, State of Iowa, for the removal of a certain cause therein pending, wherein Emanuel H. Crane is plaintiff, and the Chicago & Northwestern Railway Co. defendant, to the circuit court of the United States in and for the southern district of Iowa, central division:

Now, if the said Chicago & Northwestern Railway Co., your petitioner, shall enter in the said circuit court of the United States on the first day of its next session copies of all process, pleadings, depositions, testimony, and other proceedings in said —, and shall pay all costs that may be awarded by said circuit court of the United States if said court shall hold that said suit was wrongfully

52 or improperly removed thereto, then this obligation to be void; otherwise in full force and virtue.

Witness our hands and seals, this 6th day of June, A. D. 1883.

THE CHICAGO & NORTHWESTERN RAILWAY CO.

By its attorneys—
WHITING S. CLARK,
J. J. SMART.

STATE OF IOWA, } ss:
Polk Co., }

I, J. J. Smart, of said county, the surety named in the foregoing bond, being duly sworn, do depose and say: That I am a resident of the State of Iowa; that I am worth the sum of five hundred dollars beyond the amount of my debts; that I have property in
53 the State of Iowa liable to execution equal to the sum of five hundred dollars.

J. J. SMART.

Subscribed and sworn to before me, this 6th day of June, A. D. 1883.

T. F. STEVISON,
Notary Public for Polk Co., Iowa.

On June 16th, 1883, the following proceedings were had and entered of record:

EMANUEL CRANE *v.* THE CHICAGO & N. W. R'Y CO.

This cause coming on for hearing on the demurrer of defendant to the petition herein, the court, being fully advised, having heard the argument of counsel, now, June 4th, overrules the de-
54 murrer; to which order and ruling defendant excepts, and is granted five days to plead.

And on June 25th, 1883, the following proceedings were had and entered of record:

E. H. CRANE *v.* C. & N. W. R'Y CO.

Before Judge Connor:

This cause coming on for hearing on the petition and bond of defendant for a change of forum to the United States court, the court, being fully advised, approves the bond, and orders that this cause be transferred to the circuit court of the United States, central division, southern district of Iowa.

Fees.

Clerk ($1.50 p'd by P. att'y)	$3 25
Barcroft, B. & S. & C. & S. copy	3 00
A. D. Littleton, sheriff	90
Trans. p'd by def't	5 25
	$12 40

55 STATE OF IOWA, } ss:
Polk County, }

I, P. D. Ankeny, clerk of the circuit court within and for the county and State aforesaid, do hereby certify the foregoing to be a full, true, correct, and complete copy of the entries of record and pleadings and papers in the above-entitled cause, as made by said circuit court, as full, true, correct, and complete, as the same remains of record in my office.

In testimony whereof, I hereunto set my hand and affix the seal of said circuit court, this 12 day of September, A. D. 1883.

[SEAL.] (S'g'd) P. D. ANKENY,
Clerk of said court.
By L. A. WILKINSON, *Deputy.*

56 (Endorsed:) 3089. Emanuel H. Crane *vs.* C. and N. W. R'y *et al.* Transcript from circuit court Polk county. Filed Oct. 16, 1883. Ed. R. Mason, clerk.

57 And on the 16th day of October, 1883, the defendant, by N. M. Hubbard and Whiting S. Clark, filed in said cause a motion to conform the pleadings herein, which said motion is in the words and figures following, to wit:

58 In the U. S. Circuit Court in & for S. Dist. of Iowa.

E. H. CRANE
vs.
THE CHICAGO & NORTHWESTERN R'Y CO. & THE D. M. & M. R'Y CO.

Now comes the defendant, The Chicago & Northwestern R'y Co., & moves the court for leave to withdraw its answer herein, and that the proceedings herein thereupon be conformed to the practice of this court.

N. M. HUBBARD & WHITING S. CLARK,
Att'ys for Def't.

(Endorsed:) E. H. Crane *vs.* The Chicago & Northwestern R'y Co. Motion to conform proceedings to practice of this court. Filed Oct. 16, 1883. Ed. R. Mason, clerk. N. M. Hubbard & Whiting S. Clark, att'ys for def't.

59 And on the 28th day of September, 1883, the plaintiff, by his attorneys, filed a trial notice in said cause, which said trial notice is in the words and figures following, to wit:

60 In the United States Circuit Court, Southern District, Central Division. Oct. Term, 1883.

EMANUEL H. CRANE, Pl'ff,
vs.
THE CHICAGO & NORTHWESTERN R. R. Co. and THE DES MOINES & MINNEAPOLIS R. R. Co. } Law. No. ——.

To the clerk of said court:

Please set the above-entitled cause down for trial at the October term, 1883.

(S'g'd) BARCROFT, BOWEN & SICKMON &
(S'g'd) CALLENDER & SMITH,
Atty's for Pl'ff.

(Endorsed:) U. S. circuit court. Law. No. ——. Emanu-
61 el H. Crane, pl'ff, *vs.* Chicago & Northwestern R. R. Co. & D. M. & Minn. R. R. Co. Trial notice. Filed Sep. 28, 1883. Ed. R. Mason, clerk. Barcroft, Bowen & Sickmon & Callender & Smith, attys' for pl'ff.

62 And on the 30th day of October, 1883, the plaintiff, by his attorneys, filed in said cause a motion to remand this cause, which said motion is in the words and figures following, to wit:

63 In the Circuit Court of the U. S., Southern District of Iowa, Central Division.

EMANUEL H. CRANE
vs.
CHICAGO & NORTHWESTERN RAILROAD Co. & DES MOINES & MINNEAPOLIS RAILWAY COMPANY.

Comes now the plaintiff, Emanuel H. Crane, by his attorneys, Callender & Smith and Barcroft, Bowen & Sickmon, and files this his motion to strike from the files of this court, and also to remand to the Polk county circuit court, the above-entitled cause, for the following reasons, to wit:

1. It fully appears from the record in this cause that the same is not a controversy that is removable to this court upon ac-
64 count of the citizenship of the respective parties, to wit, the plaintiff, Emanuel Crane, and one of the defendants, to wit, The Des Moines & Minneapolis Railroad, being residents and citizens of the State of Iowa, while the other defendant is a resident and citizen of the State of Illinois.

2. It fully appears from the said record that each and all of said parties are necessary and proper to be made parties, in order to obtain a full and final decree or judgment upon the matters and things in controversy in this cause.

3rd. The Des Moines & Minneapolis Railway Company is still an existing corporation and the owner, in fact, of the line of road of

which complaint is made, and the mere fact that the co-de-
65 fendant, The Chicago & Northwestern Railroad Company, has purchased the stock or leased the line does not render said Minneapolis company a nominal party, for we have still a right to a judgment against it if we recover.

(Signed) CALLENDER & SMITH &
BARCROFT, BOWEN & SICKMON,
Att'ys for Pl'ff.

(Endorsed:) U. S. circuit court. Emanuel H. Crane *vs.* Chicago & Northwestern Railway Co. *et al.* Motion to remand. Filed Oct. 30, 1883. Ed. R. Mason, clerk.

66 And on the 3rd day of November, 1883, it being of the October term, 1883, of said court, in the record of the proceedings thereof is an entry in said cause in the words and figures following, to wit:

67 United States Circuit Court, Southern District of Iowa, Central Division. October Term, 1883.

SATURDAY, *November* 3, 1883.

EMANUEL H. CRANE
vs.
CHICAGO & NORTHWESTERN RAILWAY COMPANY *et al.* } No. 3089. Law.

This cause came on this day for hearing on plaintiff's motion to remand this cause to the State court. Plaintiff appeared, by Barcroft, Bowen and Sickmon, and defendants, by N. M. Hubbard, and the said motion was submitted to the court, and arguments to be sent Judge Shiras within ten days.

68 And on the 5th day of February, 1884, the defendants, by *its* attorneys, filed in said cause a petition for rehearing, which said petition is in the words and figures following, to wit:

69 *Def'ts' Petition for Rehearing on Pl'ff's Mo. to Remand.*

In the U. S. Circuit Court, in & for the S. Dist. of Iowa.

E. H. CRANE *vs.* THE CHICAGO & NORTHWESTERN R'Y CO.

Def'ts respectfully desire & ask of the court a rehearing & reargument of the questions involved in pl'ff's mo. to remand, & especially in respect—

1st. As to the enforcement of specific performance of the contract involved by mandamus.

2d. That the D. M. & M. R. R., by virtue of public statute in force at the time of all the transactions in question, has been permitted to disqualify itself & put it out of its power to respond to any
70 judgment mandamus: that no judg't of mandamus can, therefore, issue to the D. M. & M. R. R. Co., & this corporation is necessarily a nominal party.

Code, sec. 1300.

I.

The first question & its bearing, the court will remember, was not discussed at all in the submission of the mo. by counsel for pl'ff or def'ts.

The reason was that this question was fully discussed on demurrer in the State court, & was practically abandoned by pl'ff's counsel, & wholly ignored by the State court, in the grounds for overruling the demurrer.

In fact, we think we can satisfy the court that, so far as the allegation of the contracts and their enforcement by mandamus
71 is concerned, this is all mere surplusage and irrelevant.

The action is to be maintained, if at all, solely upon the substantial allegations that a railroad was originally built, & for a time operated through, Polk City, & subsequently the track was changed, as alleged; & upon these allegations alone, if at all, must be based the pl'ff's prayer for judg't of mandamus.

This proposition is conclusively established by the following authorites:

Parrott *v.* Bridgeport, 44 Conn., 182.
Seymour *v.* Ely, 37 Conn., 108.
County Court *v.* Temple Co., 16 Ohio, 308.
Bohanman *v.* Howard Co., 39 Mo., 375.
State *ex rel. v.* Bridgman, 8 Kas., 458.
State *v.* R. R. Bridge Co., 20 Kas., 404.
Barson *v.* Paull, 6 El. & Bl., 273.

72 In Barson *v.* Paull, 6 El. & Bl., 273, Lord Campbell, C. J., said: "I am of opinion that the right to demand mandamus for the fulfillment of a duty under sec. 68 does not extend to the fulfillment of duties arising merely from personal contract.

"If it did so, it would extend to every case of contract, for no doubt it is the duty of one who makes a promise to fulfil it."

II.

The court will see that when all the allegations as to the contracts involved drop out, as they inevitably must from the authority, when there is no question as to the enforcement of the contracts in question against the D. M. & M. R'y Co., then our 2nd proposition, that
73 the D. M. & M. R'y Co. is a nominal party, because it is not only out of possession, but by virtue of public law has put it out of its power to respond to any writ of mandamus, must necessarily be true.

If no mandamus can issue to the D. M. & M. R'y Co., then, of course, this def't is a nominal party in the proceeding.

The opinion of the court does not discuss or cover this branch of the case, and evidently because it is based upon the proposition that the original contracts being involved this makes the D. M. & M. R. R. Co. a proper and necessary party.

But the contracts must drop out, as we have seen, and no manda-

mus can issue against the D. M. & M. R. R. Co., because it has rightfully and legally put it beyond its power to respond thereto and obey.

Mitchell *v.* Speer, 39 Geo., 56.
74 Dodd *v.* Miller, 14 Ind., 433.
Hayne *v.* Hood, 1 Rich. (S. C.), 16.
Rice *v.* Walker, 44 Iowa, 458.

We have barely outlined these propositions; they are sustained by the authorities.

These features have inadvertently escaped the consideration of the court.

The case is one of great importance, and we desire a rehearing in order that these and other features of the case may be fully considered, and respectfully urge the same upon the consideration of the court.

(Signed) N. M. HUBBARD & WHITING S. CLARK,
Def't's Att'ys.

(Endorsed:) In circuit court of the U. S., southern dist. of Iowa. E. H. Crane *vs.* Chi. & N. W. R'y Co. Petition for rehearing of pl'ff's mo. to remand. Filed Feb. 5, 1884. Ed. R. Mason, clerk. N. M. Hubbard & Whiting S. Clark, def't's att'ys.

75 And on the 24th day of May, 1884, it being of the May term, 1884, of said court, in the record of the proceedings thereof is an entry in said cause in the words and figures following, to wit:

76 United States Circuit Court, Southern District of Iowa, Central Division. May Term, 1884.

SATURDAY, *May* 24, 1884.

EMANUEL H. CRANE
vs.
CHICAGO AND NORTHWESTERN RAILWAY COMPANY and DES MOINES & MINNEAPOLIS RAILROAD COMPANY. } No. 3089. Law.

This cause came on this — for hearing, having been heretofore submitted to the court upon plaintiff's motion to remand this cause to the State court.

Plaintiff appears, by Barcroft, Owen and Sickmon, and defendants, by N. M. Hubbard and Whiting S. Clark, and the court being now fully advised in the premises, it is ordered that said motion to remand be, and the same is, sustained.

Thereupon it was ordered — adjudged that this cause be
77 remanded to the circuit court of Iowa in and for Polk county, and that the plaintiff do have and recover of and from the defendant, The Chicago and Northwestern Railway Company, the

costs herein, taxed at $——, and that execution issue therefor. To which ruling the defendant, The Chicago and Northwestern Railway Company, at the time duly excepted, and prayed a writ of error to the Supreme Court of the United States, which is allowed, and the bond fixed at the sum of two thousand dollars.

78 And on the 26th day of May, 1884, a supersedeas bond was filed in said cause, which said bond is in the words and figures following, to wit:

79 In the Circuit Court of the United States, Southern District of Iowa.

EMANUEL H. CRANE

vs.

THE CHICAGO & NORTHWESTERN R'Y CO. & THE DES MOINES & MINNEAPOLIS R. R. CO.

Know all men by these presents, that the Chicago & Northwestern R'y Co., as principal, and James Callanan, as surety, are held & firmly bound unto Emanuel H. Crane, of Polk county, Iowa, in the sum of two thousand dollars, to be paid to the said Crane, his executors or administrators; to which payment, well & truly to be made, we bind ourselves, and each of us, jointly and severally, & our & each of our heirs, executors, administrators, & successors, firmly by these presents.

Sealed with our seals. Dated this 26th day of May, 1884.

80 Whereas the above-bounden Chicago & Northwestern R'y Co. hath prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled action by the said circuit court of the United States for the southern district of Iowa remanding said cause to the State court:

Now, therefore, the condition of this obligation is such that if the above-named Chicago & Northwestern R'y Co. shall prosecute its said writ of error to effect, and answer all costs & damages if it shall fail to make good its plea, then this obligation shall be void; otherwise to remain in full force & effect.

(Signed) THE CHICAGO & NORTHWESTERN R'Y CO.

By its Att'y,

WHITING S. CLARK.

(Signed) J. CALLANAN, *Security.*

81 *Qualification of Sureties.*

STATE OF IOWA, }
Polk County, } *ss:*

We, the undersigned, first being duly sworn, depose and say, and each for himself deposes and says: That he is one of the sureties whose

name is subscribed to the within and foregoing bond; that he is a resident of the State of Iowa; that he is worth double the sum secured by said bond beyond the amount of his debts and liabilities, to wit, the sum of two thousand dollars, and that he has property liable to execution in said State equal to the sum secured in said bond, to wit, the sum of four thousand dollars.

(Signed) J. CALLANAN.

Subscribed in my presence and sworn to before me by J. Callanan this 26th day of May, A. D. 1884.

[SEAL.] (Signed) C. B. ATKINS,
Notary Public.

Approved.

(Signed) C. P. SHIRAS, *Judge.*

82 (Endorsed:) U. S. C. court, S. dist. Iowa. E. H. Crane *vs.* The C. & N. W. R'y Co. No. 3089. Law. Supersedeas bond. Filed May 26, 1884. Ed. R. Mason, clerk.

83 And on the 26th day of May, 1883, a writ of error was issued in said cause, the original of which, together with the allowance endorsed thereon, is hereto attached, in the words and figures following, to wit:

84 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judge of the circuit court of the United States for the southern district of Iowa, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, between Emanuel H. Crane, plaintiff, and The Chicago and Northwestern Railway Company and Des Moines and Minneapolis Railroad Company, defendants, a manifest error hath happened, to the great damage of the said Chicago and Northwestern Railway Company, as by its complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the

said Supreme Court, the 26th day of May, in the year of our Lord one thousand eight hundred and eighty-four.

[SEAL.] E. R. MASON,
Clerk of the Circuit Court of the United States,
Southern District of Iowa.

Allowed by—
O. P. SHIRAS, *Judge.*

[Endorsed:] Crane *vs.* Chicago & Northwestern Railway Co. Writ of error. Filed May 26, 1884. Ed. R. Mason, clerk.

85 And on the 11th day of June, 1884, a citation was filed in said cause, the original of which, with the acknowledgement of service endorsed thereon, is in the words and figures following, to wit:

86 The United States of America to Emanuel H. Crane, Greeting: You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the United States circuit court for the district of Iowa, wherein The Chicago and Northwestern Railway Company was plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

87 Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 26th day of May, in the year of our Lord one thousand eight hundred and eighty-four.

O. P. SHIRAS, *Judge.*

Service of the foregoing citation is hereby acknowledged with the receipt in hand of a copy thereof, at Des Moines, Polk county, Iowa, June 11th, 1884.

CALLANDER & SMITH, AND
BARCROFT & BOWEN.

[Endorsed:] U. S. circuit court, S. dist. Iowa. E. H. Crane *v.* The C. & N. W. R'y Co. Citation. Filed June 11, 1884. Ed. R. Mason, clerk.

88 And on the 1st day of February, 1884, an opinion by the court, on the motion to remand, was filed in said cause, which said opinion is in the words and figure following, to wit:

89 In the United States Circuit Court for Southern District of Iowa, Central Division.

EMANUEL H. CRANE
v.
CHICAGO & NORTHWESTERN RAILWAY COMPANY *et al.* } Motion to Remand.

Barcroft, Bowen & Sickmon, Callender & Smith, for complainant; W. S. Clark, N. M. Hubbard, for defendants.

SHIRAS, District Judge:

The petitioner in the above cause filed in the circuit court of Polk county, Iowa, a petition wherein he averred and set forth that he was a resident and property owner in Polk City, Iowa; that the Des Moines and Minnesota R. R. Company, formerly called the Des Moines and Minneapolis R. R. Company, a corporation created and organized under the laws of the State of Iowa for the purpose
90 of constructing and operating a line of railway from the city of Des Moines, in Iowa, to the State line, in the direction of Minnesota; that the original line surveyed and constructed passed through Polk City; that said company caused the necessary steps to be taken to procure the voting of a tax of three per cent. in aid of said railway in Madison township, wherein Polk City is located, the condition upon which said tax was voted being that line of railroad should be built from the city of Des Moines via Polk City through Polk county; that the tax was voted and paid to the R. R. company, which constructed and operated its line of road through Polk City; that Polk county, through its board of supervisors, in consideration of the agreement of the company to build and operate its line through Polk county via Polk City, granted to said company some fifteen thousand acres of swamp lands belonging to the county, subscribed to the capital stock of the company on condition that
91 the line of said road should pass through Polk City; that said company constructed its line of railroad from Des Moines through Polk City to Ames in Story county, and operated the same until 1880; that in the year 1879 the Chicago & Northwestern Railway Company leased said line of railway from the Des Moines and Minnesota Company, and thereafter changed the line and location of the railroad so that its main line passes about two miles east of Polk City and not upon the line upon which it was originally constructed, whereby complainant and other property owners in Polk City have been greatly damaged.

The Des Moines and Minnesota R. R. Co. and the Chicago & Northwestern Railway Co. were both made parties def't to the petition, and the prayer for relief is as follows:

"Wherefore plaintiff demands that defendants be required to reconstruct and operate the main line of said railroad upon the
92 line originally constructed, running from the city of Des Moines, in Polk county, Iowa, north, via Polk City, to Ames, in Story county, Iowa, making Polk City a station on the said main and continuous line of railroad from the city Des Moines, Iowa, to Ames, Iowa, and that the same be constructed and operated in full compliance with the terms and conditions upon which the taxes were voted and paid, swamp lands conveyed, and subscriptions paid as aforesaid, and prays a peremptory writ of mandamus commanding the said defendants to forthwith comply with the above demands, and for such other remedy and relief as may be lawful and proper in the premises."

Both defendants appeared in the State court and filed a joint answer, wherein they admit that the line of the railway as originally

built was located through Polk City, and that the tax aid was voted and the swamp lands were granted as charged in the petition.

93 The defendants then aver that the Chicago & Northwestern has leased the line of road in question of its co-defendant, and has become the owner of the stock, franchises, privileges, & property of the Des Moines & Minnesota R. R. Company; that the line as originally constructed via Polk City was narrow gauge, badly built, with high grades and many curves; that the Chicago & Northwestern R. R. Company, desiring to change the road to a broad-gauge line, and to improve it in other particulars, and to shorten the distance, and for other reasons, made overtures to the citizens of Polk county for liberty to change the location of its line, and finally entered into a written contract with some thirty-five citizens of Polk City, wherein it was provided that the line might be changed upon certain terms and conditions, in the contract set forth, all of which, with the acts of the company in fulfillment thereof, are

94 set forth at length in the answer.

Thereupon the Chicago and Northwestern R'y Company filed a petition for the removal of the cause to the Federal court, averring therein that complainant was a citizen of Iowa, The Chicago and Northwestern a corporation created under the laws of the State of Illinois; that the Des Moines and Minnesota R. R. Company, a corporation created under the laws of the State of Iowa, was merely a nominal party in the suit, for the reason that the Chicago and Northwestern Company was the owner of all the stock and franchises of the Des Moines and Minnesota Company and the leases in perpetuity of said railway, and as such is charged with the duty of operating said railway, and subject to the payment of all claims and demands made against the Des Moines and Minnesota R'y Company, and also solely liable to obey any orders and perform any judgment made in this cause, and that the controversy can be fully de-

95 termined between complainant and the Chicago and Northwestern R. R. Co., who are citizens of different States, without the presence of the Des Moines and Minnesota R. R. Company; and further averring that the amount in controversy exceeds five hundred dollars in value.

The State court granted the prayer of this petitioner, and the record has been filed in court. The complainant moves to remand, on the ground that complainant and one of the def'ts, The Des Moines and Minnesota R. R. Company, are citizens of the State of Iowa, and were such when the suit was brought.

On part of the Chicago and Northwestern R'y Company it is claimed that the Des Moines and Minnesota Co. is merely a nominal party to the suit, whose presence as a co-def't does not defeat the right of the C. & N. W. Company to a removal of the controversy from the State to the Federal court.

96 It is not claimed that there is a separable controversy wherein complainant and the Chicago Northwestern are alone interested. There is but one controversy involved in the matters set forth in the pleadings, and therefore, to justify a removal to this court, it must be held that the Des Moines and Minnesota R. R.

Company is not a material but only a nominal party def't to the petition.

The contract for the construction and operation of the line of railway through Polk City, for the alleged breach of which this suit is brought, was entered into by the Des Moines & Minnesota Company. It was that company which received the tax aid and swamp lands, which, according to the averments of the petition, were given it in consideration of the agreement on its part to construct and operate the line of railroad through Polk City.

97 The prayer of the bill, in the first instance, is for a decree enforcing specific performance, and, failing in that, for such other relief as may be proper.

To obtain relief in either form, it is incumbent upon complainant to prove that he had a contract or agreement with the Des Moines & Minnesota R. R. Co., whereby that company was and is bound to construct and operate the main line of its road through Polk City.

The whole equity & right of complainant is based upon the existence of such an agreement, and, therefore, its existence, its validity, the true construction thereof, and the rights & equities conferred thereby are matters absolutely and essentially necessary to be shown on behalf of complainant.

A decree to the effect that the Des Moines & Minnesota R. R. Co. had bound itself to construct and operate the main line of its
98 road through Polk City would certainly affect the rights and interests of that company. That company is still the owner of the road, subject to the lease executed to C. & N. W. R. R. Company. A decree requiring a change in the present location of the railway would affect the property, therefore, of the Des Moines and Minnesota R. R. Co. The contract which is sought to be established and enforced is the contract of the later company, and that company has an interest in the property to be affected by the decree. As is said by the Supreme Court of the U. S., in Mallon *v.* Hinde, 12 Wheaton, 193, "How can a court of equity decide that these contracts ought to be specifically decreed without hearing the parties to them? Such a proceeding would be contrary to the rules which govern courts of equity and against the principles of natural justice."

It is urged in argument that, by reason of the leasing of
99 the property in perpetuity to the Chicago and Northwestern Company, the Des Moines & Minnesota has parted with all interest in the property.

The fact that it is a lease and not an absolute sale of the property shows that the Des Moines & Minnesota Co. still retains a title and a legal interest in the property.

The court cannot know but what the C. & N. W. Company may in the future forfeit the lease, so that the possession and use of property may revert to the lessor or owner.

It does not appear but what the Des Moines & Minnesota is still vitally interested in the management and success of the road, as the rental paid may be dependent upon the amount of the earnings and

expenses, and there will in all probability be affected in some degree by the result of this litigation.

But aside from these considerations, the fact remains undoubted that the very foundation of complainant's case is the existence of the alleged contract with the Des Moines & Minnesota
100 R. R. Co. binding that company to operate its main line through Polk City, and the necessity of establishing this contract imposed the duty on complainant of making the company that is alleged to have made it a party def't to the suit.

In Findlag *vs.* Hinde, 1 Peters, 241, it was ruled that "to a bill of specific performance of a contract to convey land the vendor is a necessary party, though he has parted with his title and his grantees are made parties." In that case it was claimed that one Garrison had bound himself to convey certain land to William & Michael Jones, and that he had afterwards conveyed the land to other parties. The latter parties were made def'ts to a bill for specific performance, and it was pleaded that there was a defect of parties because Garrison was not a party. In answer thereto it was urged that, as Garrison had conveyed the land to others, & as these parties were def'ts,
101 and the decree for conveyances of title would operate against them, it was not necessary to make Garrison a party to the bill. The Supreme Court held that he was a necessary party, saying that complainant "can have no claim to it in equity but through and under the executory contract of Garrison with the Jones'. Garrison has a right to contest the equitable obligation of that contract. No decree can be made for the complainants without first deciding that the contract of Garrison ought to be specifically decreed. He might insist that the purchase-money had not been paid, or make various other defenses. It is not true that if he were made a party no decree could be made against him. It might not be necessary to require him to do any act; but it would be indispensable to decide against him the validity of his obligation to convey and overrule such defence as he might make."

102 Under the doctrine thus announced it is clear that in the present case the Des Moines & Minnesota Company has the right to contest the existence of the contract alleged against it. As already said, the existence, the true construction, & binding force of the alleged contract, and the right of complainant to demand a specific performance of its terms are the questions material to the determination of this litigation, and their decision requires the presence of the party who it is alleged made & entered into the contract sought to be enforced.

When the petition for removal was filed the Des Moines & Minnesota R. R. Company had appeared in the cause and by joining in the answer filed had put in issue complainant's right of recovery.

The record shows upon its face that there was then pending a controversy between complainant and the Des Moines & Minnesota Company.

In that controversy the latter company would be entitled,
103 if the proofs & the law justified it, to a decree in its favor, and the complainant in like manner would be entitled to a

decree establishing the existence of the contract, its breach, and for the appropriate remedy.

Under the circumstances it cannot be held that the Des Moines & Minnesota Company is merely a nominal party.

The decree sought affects its rights, and on principle it should be heard before a decree is passed affecting those rights. Having been made a party the record shows that it is seeking to defend itself, and to that end is seeking to defeat the entire claim & remedy sought by complainant. It is, therefore, both a proper and an active party to the controversy.

The fact alleged in the petition for removal, that the C. & N. W. R. R. Company owns the stock & other property of the Des Moines & Minnesota Company, cannot change this result.

104 It is not claimed that there has been a merger of the one corporation into the other.

The Des Moines & Minnesota Co. is still a distinct and separate company, and the court cannot take cognizance upon questions of this character, of the ownership of the stock in the corporation.

The C. & N. W. Company may sell all the stock owned by it in the Des Moines & Minnesota Company, but that would not change the legal status of the latter company.

The controversy of complainant is with the company and not with its stockholders.

Having reached the conclusion that the Des Moines & Minnesota R. R. Company cannot be held to be a nominal party in this controversy, but, on the contrary, is a material and active participant therein, it follows that the case is not one properly removable

105 unto this court, and the motion to remand must be sustained, and it is so ordered.

McCrary, C. J., concurs.

(Endorsed:) E. H. Crane *et al. vs.* Chi. & N. W. R'y Co. Opinion on motion to remand. Filed Feb. 1st, 1884. Ed. R. Mason, clerk.

106 And on the 8th day of February, 1884, an opinion by the court on defendant's petition for rehearing was filed in said cause, which said opinion is in the words and figures following, to wit:

107 In United States Circuit Court for Southern District of Iowa. Central Division.

E. H. Crane

v.

The Chicago and Northwestern R. R. Company.

Petition for rehearing on motion to remand.

A rehearing on the motion to remand is asked on two grounds:

1st. It is urged that the authorities show that mandamus will not lie to enforce an ordinary personal contract, and hence that this remedy cannot be granted in the present case against the Des Moines & Minnesota Company.

If it is not an appropriate remedy against the D. & M.,
108 neither is it appropriate against the C. & N. W.

Whether or not it is a proper remedy under the facts in this case is a question made upon the pleadings, and is it to be determined & decreed upon the hearing.

This court, upon a motion to remand, based upon the ground that this court has not jurisdiction of the cause, cannot pass upon a question at issue in the cause of the character of that raised by counsel.

II.

The bill in this cause not only prays for a mandamus, but for other appropriate relief. It is based upon two general facts:

1st. That the Des Moines and Minnesota R. R. Company bound itself by a contract, to the benefit of which pl'tff is entitled,
109 to build & operate to the main line of its road through Polk City.

2nd. That the Des Moines & M., and its lessee, the C. & N. W., have violated this contract to the injury of complainant.

The relief sought is specific performance, to which end a mandamus is prayed and other relief.

The essential fact necessary to be shown to sustain the bill is that the Des Moines & M. Company entered into the contract alleged.

This is as essential to relief against the C. & N. W. as against the Des Moines & Minnesota.

The latter company defends the action & denies the existence of the contract and the right of complainant to enforce same.

In passing upon the issue whether *whether* such a contract as is alleged in the bill was made by the Des Moines & M. Co., the
110 latter company is a material & not a nominal party.

If it is shown that such a contract was not made, that ends the case, and in settling this issue the complainant has the right to make the Des M. & M. Co. a party, so as to bind it by the conclusion reached.

And the latter company has a right to contest the claim made against it.

If it is decided that such a contract exists, and that it has been violated, then the question will arise as to the remedy, if any, that can be given.

If mandamus is not a proper remedy, a decree for specific performance aided by injunction may be proper, and it may be that the Des M. & M. should be included therein.

111 It certainly should be included in so much of the decree as determines the question of the existence of the alleged contract and its breach.

The line of reasoning employed in petition for rehearing requires this court to determine questions presented on the record as it now stands, claiming that if properly decided according to the weight of authority it will appear that relief by mandamus cannot be given against the Des Moines & Minnesota R. R. Company.

And therefore that company is merely a nominal party.

o determine these questions requires the court to examine and pass upon part of the issues presented on the record, which can hardly be expected upon a motion to remand.

But admitting that relief by mandamus may not be proper, some other form of relief may be grantable, and hence the court
112 must hear and determine the issue made by the bill and answer of the Des M. & M. R. R. Co., to wit, was there a contract made by the latter company regarding the line of the railroad, and, if so, has there been a breach thereof?

To this issue made by the pleadings, and which is essential to the final decision of the cause, the Des M. & M. R. R. Company is an active and material party, and can not be held to be a nominal party.

Petition for rehearing overruled.

(Sg'd) O. P. SHIRAS, *Judge.*

(Endorsed:) E. H. Crane *v.* C. & N. W. R. R. Company *et al.* Order overruling petition for rehearing. Filed Feb. 8, 1884. Ed. R. Mason, clerk.

113 United States Circuit Court, Southern District of Iowa, Central Division.

I, Edward R. Mason, clerk of said court, do hereby certify that the above and foregoing transcript contains full, true, and complete copies of all the pleadings, proceedings, and record entries in a certain cause adjudicated in said court, wherein Emanuel H. Crane was plaintiff and The Chicago and Northwestern Railway Co. *et al.* were defendants, as full, true, and complete as the originals of the same now remain on file and of record in my office.

I do further certify that the original writ of error and the citation, with acknowledgment of service endorsed thereon, are hereto attached and herewith returned.

In testimony whereof I hereunto subscribe my name and affix the seal of said court, at my office, in the city of Des Moines, in said district, this fifth day of July, 1884.

[SEAL.] EDWARD R. MASON,
Clerk U. S. Circuit Court, Southern District, Iowa.

114 The interlineations made and marked (1), (2), (3), (4), (5), (6), (7), (8), (9), (10) are so made by consent of the parties hereto, to conform to the original papers.

Des Moines, Iowa, August 6th, 1884.

BARCROFT & BOWEN, AND
CALLANDER & SMITH,
Attorneys for Plaintiff.
N. M. HUBBARD &
WHITING S. CLARK,
Att'ys for Def'ts.

Endorsed on cover: S. Iowa. C. C. U. S. No. 1186. The Chicago & Northwestern Railway Company, plaintiff in error, *vs.* Emanuel H. Crane. Filed October 31, 1884.

In the Supreme Court of the United States.

EMANUEL H. CRANE,
Defendant in error.
vs.
THE CHICAGO & NORTHWESTERN RAILWAY COMPANY,
Plaintiff in error.

No. 3089 Law.

ERROR TO THE UNITED STATES CIRCUIT COURT,
Southern District of Iowa, Central Division.

BRIEF FOR PLAINTIFF IN ERROR.

BY N. M. HUBBARD.

In the Supreme Court of the United States.

EMANUEL H. CRANE, *Defendant in error.* vs. THE CHICAGO & NORTHWESTERN RAILWAY COMPANY, *Plaintiff in error.*	*No.* 3089 *Law.*

ERROR TO THE UNITED STATES CIRCUIT COURT,

Southern District of Iowa, Central Division.

BRIEF FOR PLAINTIFF IN ERROR.

BY N. M. HUBBARD.

This is an action by Crane for mandamus to compel the Railway Companies, defendants, to re-lay and operate a certain narrow gauge railroad. The suit was begun in the Circuit Court for Polk County, in the State of Iowa, and

removed to the Federal Court by the Chicago & Northwestern Railway Company. Crane moved to remand, which motion was sustained by the court, and from this ruling the Chicago & Northwestern Railway Company brings the case to this court on error. The facts are in substance as follows:

In 1871, the Des Moines and Minnesota Railroad Company was organized under the laws of Iowa to build a narrow guage railroad from the city of Des Moines to the North line of the State of Iowa. Soon afterward, the corporate name was changed to the Des Moines & Minneapolis Railway Company. During the years 1872-3&4, the Des Moines & Minneapolis Company built a narrow gauge railroad from Des Moines via Polk City to Ames, in Story County, a distance of 38 miles, and in 1875-6, extended the road 20 miles further north towards the state line to Story City.

Polk City is a small town with two or three hundred people on the line about half way between Des Moines and Ames. Prior to the building of the road, Madison township, in which Polk City is situated, voted a tax of of 3 per cent. to aid in the construction of the road. This tax realized about $17,000. To further aid the building of the road, the county of Polk gave to the company about 15,000 acres of swamp lands. Some private subscriptions were also made by the people of Madison township, the exact amount is not stated or known.

Polk City is situated on low ground and it required a grade of nearly 85 feet to the mile for three miles to get down into the town, and about the same grade for about the same distance to get out of it, and lengthened the distance between Des Moines and Ames about two miles and a half. The narrow gauge was built practically on the surface of the ground, with very few cuts and very few fills.

In 1879, the Chicago & Northwestern Railway Company, owning a connecting line at Ames, leased in perpetuity the Des Moines & Minneapolis railroad, with all its franchises and privileges. In 1880, the Chicago & Northwestern Company purchased all the stock and became the sole owners of the Des Moines and Minneapolis Railroad, and at once began changing the narrow gauge road between Des Moines and Story City to a broad gauge line. This work proceeded, and the road was extended from Story City to the north line of the State at Elmore, where it was completed in 1881 to a connection with a line from Elmore to St. Paul and Minneapolis, known as the Chicago St. Paul, Minneapolis and Omaha Road, which is a proprietary road of the Chicago & Northwestern Railway Company. When thus completed, as it will be seen by the map, the Chicago & Northwestern Railway Company has a direct line from Des Moines to Minneapolis and St. Paul. The road is built in every way first class, with steel rails, was expected to do and is doing a large and profitable through traffic.

Owing to the difficulty in getting into Polk City and getting out of it, early in 1880, the Chicago & Northwestern Company surveyed a direct line which entirely obviated the heavy grade and saved two miles and a half distance by going two miles east of Polk City. By the road as thus constructed and now operated to St. Paul an ordinary engine is capable of hauling 25 to 30 loaded cars, whereas the same engine could only haul 12 to 13 cars by the line through Polk City.

Before proceeding to make this change of line the Chicago & Northwestern Co. had several conferences with the people of Polk City, both by public meetings and with the principal citizens in reference to the matter.

The depot for Polk City on the Narrow gauge was

about one quarter of a mile from the town. The Northwestern Co. proposed to the people of Polk City that if they would consent to the abandonment of the narrow gauge road, the company would build a broad guage spur from a point about two miles northeast of Polk City into the town, would move their depot to a point nearly a quarter of a mile closer to their village, would construct cattle yards at a convenient point, would run at least one passenger train each way daily into the village, and also at least one mixed passenger and freight train daily except Sundays; would move all freight promptly, and would make no greater charge for either passengers or freight than as though Polk City were on the main line as changed to the east of the town.

The company also proposed, in case the citizens should desire to build a bridge across the Des Moines river, that they would haul all bridge material free from Chicago or any point west, and give one thousand dollars in money.

This proposition was accepted by the people of Polk City and a written contract made and signed by the Chicago & Northwestern and Des Moines and Minneapolis Companies and 35 of the principal tax payers and citizens of Polk City and Madison township. This contract was made in a public manner, after having been discussed in public meeting held in Polk City.

In pursuance of this contract, the Chicago & Northwestern Co. expended $15,000 in building a bread gauge spur into the town and in all respects in accordance with the agreement, and has been ever since and is now operating such spur in all respects in accordance with the agreement. The company also changed its main line two miles east of Polk City at a very large expense, and took up the narrow gauge line in the years 1880 and 1881 from Des Moines to

Story City, and has ever since operated their through main line two miles and a half to the east of Polk City.

Such are the facts briefly stated, as they appear by the petition and answer in the case. Whereupon, in May, 1883, Crane began this suit in the state court, setting forth the building of the narrow gauge, the subscriptions and taxes, and the abandonment of the line and praying as follows:

"Wherefore plaintiff demands that defendants be required to reconstruct and operate the main line of said railroad upon the line originally constructed, running from the city of Des Moines in Polk county, Iowa, north via Polk City to Ames, in Story county, Iowa, making Polk City a station on the said main and continuous line of railroad from the city of Des Moines, Iowa, to Ames, Iowa, and that same be constructed and operated in full compliance with the terms and conditions upon which the taxes were voted and paid, swamp lands conveyed and subscriptions paid as aforesaid, and prays a peremptory writ of mandamus, commanding the said defendant to forthwith comply with the above demands, and for such other remedy and relief as may be lawful and proper in the premises."

The defendant answered, admitting substantially the allegations of the petition as to subscriptions, taxes and swamp lands, and setting up the contract with the people of Polk City and Madison township for the change of their line, etc., as appears in the foregoing statement.

After the issues were thus made up, the Chicago & Northwestern Railway Company filed a petition to remove the suit into the Federal Court, and after alleging that the company was and is a citizen of the state of Illinois, and that plaintiff was and is a citizen of the state of Iowa, alleged as follows:

"That your petitioner's co-defendant, the Des Moines & Minneapolis Railway Company is merely a nominal party in this suit for the reason that your petitioner is the owner of all the stock and franchises of the Des Moines & Minneapolis Railway Company, and is the lessee of said railway in perpetuity, charged with the duty of operating said railway and subject to the payment of all claims and demands of every nature and kind made against said Des Moines & Minneapolis Railway Company, and your petitioner will be solely liable to obey any order made in this cause, and to perform any judgment rendered; that the controversy in this case is wholly between the plaintiff and the defendant, the Chicago & Northwestern Railway Company, who are citizens of different states, and which controversy can be fully determined between them without the presence of the Des Moines & Minneapolis Railway Company; that your petitioner is the only defendant actually interested in such controversy."

The company offered sufficient surety for the removal.

Crane moved to remand on the ground that the Des Moines & Minneapolis Railway Company was a necessary and proper party, and therefore no removal would lie on the ground of citizenship, inasmuch as the controversy was not separable. The court, after argument, sustained the motion and remanded the cause, to which ruling the company then and there excepted, and now assigns as error the following:

The court below erred in sustaining Crane's motion to remand the case.

The only question to determine is whether the Des Moines & Minneapolis Co. was really a nominal or a necessary party. The plaintiff in error claims that it is a nominal party merely, because

1st, There is no controversy raised in the pleadings between Crane and the Des Moines & Minneapolis Company.

2d. The only controversy which exists in the case is between Crane and the Chicago & Northwestern Railway Company as to whether the contract made between the people of Polk City and the Railway companies constitutes a sufficient reason why no mandamus should issue, and

3d. The Des Moines & Minneapolis Company in a lawful manner has deprived itself of the power to comply with a writ of mandamus, as prayed.

Of these propositions in their order. It will be observed that the defendants substantially admit all the allegations in Crane's petition, viz: that the narrow gauge road was built through Polk City on condition of voting a three per cent tax and a conveyance of the swamp lands, both of which were given to the company. But the force of these facts is avoided by setting up a new contract with the people of Polk City and Madison township whereby an agreement was arrived at between the parties which permitted the Chicago & Northwestern Railway to take up the narrow gauge road by building a broad gauge spur into the town as agreed.

This contract, while signed by both railway companies, will show on its face that it was to be performed solely by the Chicago & Northwestern Railway Company. At the time this contract was made, the Chicago & Northwestern Railway Company had not only acquired possession of the road by virtue of a lease in perpetuity from the Des Moines & Minneapolis Company, but it had also at that time purchased and owned all the stock of the Des Moines & Minneapolis Co., and it may well be said therefore, that as a matter of fact the Des Moines Company had only a nominal existence. Its organization was kept up and is still

kept up, but to all intents and purposes the Des Moines & Minneapolis Co. is merged in the Chicago & Northwestern Railway Company, and this is the ground on which the Chicago & Northwestern Company claims that it is entitled to remove the case to the Federal Court.

The Des Moines & Minneapolis Company had rendered itself powerless prior to the commencement of this action to obey or perform any writ of mandamus against it, because by section 1300 of the Code of Iowa, it is provided:

"Any such corporation may sell or lease its railway property and franchises or make joint running arrangements with any corporation owning or operating any connecting railway and the corporation operating the railway of another shall in all respects be liable in the same manner and extent as though such railway belonged to it, subject to the laws of this state."

It is averred and shown in the answer that the Chicago & Northwestern Railway Company owned a connecting line and leased the Des Moines & Minneapolis road under and by virtue of the statute above quoted. The fact of the leasing of the road and transferring of all the franchises and possession to the Chicago & Northwestern Railway Company is alleged in plaintiff's petition as well as by defendants, and this shows that the Minneapolis company is unable to respond to a mandamus.

See *High on Ex. Remedies*, 484.

Mitchell vs. Speer, 39 Ga., 56.

Dodd vs. Miller, 14 Ind., 433.

Hayne vs. Hood, 1 Rich. (S. C.), 16.

Rice vs. Walker, 44 Iowa, 458.

It will readily be seen that inasmuch as the Des Moines & Minneapolis Co. is no longer in possession of nor oper-

ating the railroad, but the Chicago & Northwestern Railway company has exclusive possession and is operating the same, that if any writ of mandamus should issue, it can only be directed against the Chicago & Northwestern Railway Company, and this remedy would be entirely effectual to the plaintiff if he is entitled to any remedy at all.

The substantive ground of action for the plaintiff for his mandamus is that the defendants are violating an implied contract to operate the narrow gauge road, because Polk City and Madison township gave a three per cent. tax and the swamp land on condition that the road should be built and operated through Polk City. But mere contract obligations cannot be enforced by mandamus.

High on Extraordinary R., sec. 321.

State vs. Turnpike Co., 16 Ohio St., 308.

Queen vs. R'y Co., 6, Ad. & Ellis, N. S., 70.

The opinion filed by the court below on sustaining the motion to remand, seems to proceed on the ground that this is a proceeding to compel the specific performance of a contract on the part of the defendant. I submit that this is a mistaken notion. At the common law the mandamus proceeding was not an action proper, nor was it a writ of right, but a prerogative writ obtained on an information under oath showing good cause for its issuance. Under the Code of Iowa, however, mandamus is an ordinary action at law, triable as nearly as may be like an ordinary action for the recovery of damages, and is not triable *de novo* in the Supreme Court like an equitable action.

Dove vs. Independent School District, of Keokuk, 41, Iowa, 689.

The statute on this subject is, Code Section 3379:

"The pleadings and other proceedings in any action in which a mandamus is claimed shall be the same in all

respects as nearly as may be, and cost shall be recovered by either party, as in an ordinary action for the recovery of damages."

The definition given of an action of mandamus by our statute is contained in section 3373, as follows:—

"The action of mandamus is one brought in a court of competent jurisdiction to obtain an order of such court commanding an inferior tribunal, board, corporation or person to do or not to do an act, the performance or omission of which the law enjoins as a duty resulting from an office, trust or station."

The action in this case is grounded upon the above section, and it is clear that unless the plaintiff is entitled to a writ of mandamus under this section he is not entitled to any remedy at all.

It will apear from the pleadings that the only issue to be tried is whether or not the contract made between the citizens of Polk City and Madison township and defendant companies was a sufficient authority for taking up the narrow gauge and building and operating a spur into the town. If this be true, this contract having been made with the sole view of performance by the Chicago & Northwestern Railway Company, it follows that the Chicago & Northwestern Railway company is the only real party interested in the controversy, and that the Des Moines & Minneapolis is a nominal party merely, against which in no event can any writ of mandamus issue.

The allegations in the petition for removal certainly present this condition of things, and the case can in no event be remanded until it is shown on trial and by proof that the defendant in error is in some way entitled to a mandamus against the Des Moines & Minneapolis Railway Company.

In McKaye vs. Mallory, 19 Blatch. p. 175, where, in a matter vitally affecting the jurisdiction, the allegations of the petition for removal were in conflict with the answer of a defendant, Judge Blatchford said on a motion to remand, after a full and elaborate discussion of the question and the authorities

"For the purposes of removal the allegations of the removing party in the petition must at this stage of the case prevail, and the suit must for the present be retained by this court."

It is therefore confidently submitted that in any view of the case, the Des Moines & Minneapolis Co. is a nominal party, and the cause ought not have been remanded.

N. M. Hubbard,
Attorney for Plaintiff in error.

118-424

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1884.

THE CHICAGO & NORTHWESTERN RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

EMANUEL H. CRANE, DEFENDANT IN ERROR.

ERROR TO THE UNITED STATES CIRCUIT COURT, SOUTHERN DISTRICT OF IOWA, CENTRAL DIVISION.

Brief for Defendant in Error.

C. H. GATCH, *of Counsel for Appellee.*

P. C. KENYON, Publisher Law Briefs, Des Moines, Iowa.

IN THE

Supreme Court of the United States.

THE CHICAGO & NORTHWESTERN RAILWAY COMPANY, *Plaintiff in Error,* *vs.* EMANUEL H. CRANE, *Defendant in Error.*	No. 3089.	Law.

Error to the United States Circuit Court, Southern District of Iowa, Central Division.

BRIEF FOR DEFENDANT IN ERROR.

The petition of the plaintiff alleges substantially that the Des Moines & Minneapolis Railway Company, organized and incorporated under the laws of Iowa for that purpose, constructed and operated a railway from Des Moines, in Polk county, to Ames, in Story county, by way of Polk City. That said company procured the levy and collection of taxes in aid of the construction of its road, as provided by statute; that it procured the conveyance of the swamp lands of Polk county under a vote of the electors thereof, and several thousand dollars of private subscriptions, as subsidies to said company, for the purpose of building said railway; all upon the express condition that the road should be constructed and operated by way of Polk City. That said company had leased its road to the Chicago & Northwestern Railroad Company, and that since the lessee has taken possession of the road the line has been

changed, so that the line as it is now operated is at least two miles from Polk City.

These facts, which we claim establish the obligation of the Des Moines & Minneapolis Railroad Company to relay and operate the road as originally constructed, are admitted.

We claim that the taxes, swamp lands and subscriptions levied, voted, made, collected, conveyed and paid to said company, upon condition that the road should be constructed by way of Polk City, created a legal obligation upon the company to continue to operate its road as originally constructed.

That it cannot absolve itself from this obligation by leasing or making any other voluntary disposition of its track.

Thomas vs. Railroad Co., 101 U. S. R., 71, and cases cited.
Id., 83, 84, 85.
Black vs. D. & R. C., 22 N. J. Eq., 130.

It may be that the Chicago & Northwestern Railroad Company, while it operates the road as lessee of the Des Moines & Minneapolis Railroad Company, would be compelled to operate it as it was constructed and operated by the Des Moines & Minneapolis Railroad Company; but there is no such obligation imposed upon it to operate the road at all, as attaches to the Des Moines & Minneapolis Railroad Company by reason of the franchise conferred upon it by its incorporation under the statute, and the conditional aid received and appropriated by it.

If, as lessee of the road, it is bound to operate it as constructed, in the same manner and to the same extent as the lessor company, the obligation is created by the contract of lease between the companies.

But it is not competent for these companies, by contract between themselves, to absolve the Des Moines & Minneapolis Railroad Company from the duties imposed upon it, or to limit the remedy of any person, aggrieved by its failure, to an action

or to proceedings against the Chicago & Northwestern Railroad Company alone.

If the Chicago & Northwestern Railroad Company is, by force of the terms of the lease or by law, obliged to perform all the duties of the Des Moines & Minneapolis Railroad Company in the operation of the road, still the Des Moines & Minneapolis Railroad Company is a necessary party for the purpose of determining the existence, nature and extent of its obligations.

Mallon vs. Heude, 12 Wheaton, 193.
Findlay vs. Wheaton, 1 Peters, 241.

The Des Moines & Minneapolis Railroad Company still exists; its functions and its obligations under its franchise and the provisions of the statute of the state, and by reason of the acceptance of compulsory statutory and voluntary aid in the construction of its road upon the stated condition, remains; and we are entitled, by proper order against it, to enforce them, without regard to what remedy we may have against its lessee. This may or may not be adequate; we are not remitted to it.

The lessor and lessee cannot by any agreement between them compel the public, or individuals interested, to resort to proceedings against the lessee alone, to enforce obligations which the law imposes upon the lessor.

The allegations of the petition do not show, as is assumed in the brief of counsel for plaintiff in error, that the Des Moines & Minneapolis Railroad Company transferred all "*the franchises and possessions to the Chicago & Northwestern Railway Company.*" It is alleged only that the Chicago & Northwestern Railway Company leased said line of railway.

The terms of the lease, its duration, or conditions, or reservations, if any, are not stated.

For all that appears in the petition, there may not be any agreement on the part of the lessee to fullfil any of the conditions, of the levy of taxes, of the conveyance of the swamp lands, of the subscription of money in aid of the construction

of the road; and it may be that the lease, at the option of the lessee, can be terminated if it should be sought to enforce the condition upon which such aid was given. Certainly there is nothing in the petition which would, without more, justify an order compelling the lessee, without regard to the terms of its lease, to continue to operate said road on the line of original construction, or at all.

The joint answer of defendants, so far as it extends or enlarges the allegations of the plaintiff's petition in relation to the terms of the lease, and so far as it sets out any new matters, is denied by the plaintiff by force of the Statute of Miller's Code, section 2665, and cases decided in the Supreme Court of Iowa, cited in margin.

So that it is not shown that the Des Moines & Minneapolis Railroad Company is unable to respond to a *mandamus*, nor that the plaintiff is entitled to a *mandamus* against the Chicago & Northwestern Railway Company, compelling it to perform the functions and obligations imposed by law upon the former, unless released by the alleged contract with certain citizens of Polk City.

It is not a mere contract obligation that is sought to be enforced, but a duty which the law enjoins upon a railroad company which, organized and incorporated under the laws of the state, avails itself of all the powers and privileges conferred by the statute, including the condemnation of private property, the levy and collection of public taxes, and conveyance of public lands under a vote of the county in aid of its construction, to construct and operate its road according to its articles of incorporation and the conditions upon which subsidies were voted, levid, collected and paid over to it.

State ex. Hartford & N. H. R. R. Co., 29 Conn., 538.
Union P. R. R. Co. ex. Hall, 91 U. S., 343.

It is claimed in the brief for plaintiff in error that the only issue to be tried is, "whether or not the contract made between

the citizens of Polk City and Madison township and defendant companies, was a sufficient authority for taking up the narrow gauge and building and operating a spur into the town." If this were true, it would not follow that plaintiff should be compelled to rely upon an order compelling the Chicago & Northwestern Railroad Company to relay the track and operate the road, upon its being determined that the alleged agreement was not sufficient authority for taking up and removing the track, and refusing to operate the road as first located and constructed, but it is not true; the existence of any such contract is in issue. The allegations of the answer, with respect to such agreement, are denied.

C. H. GATCH,
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